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Supreme Court, U.S.
FILED

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CASE NO:

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

COURT OF COMMON PLEAS OF LORAIN COUNTY,

PETITIONER,

VS.

JOHN MALINOVSKY,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

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75 pp

I

QUESTIONS PRESENTED FOR REVIEW

Whether federal courts, sitting in habeas corpus review, exceed their authority when reversing a state court decision based upon factual determinations that were not found to lack fair support in the record.

Whether the Double Jeopardy Clause of the United States Constitution is offended by the retrial of an accused whose attempt to seek strategic advantage resulted in a mistrial not caused by the prosecution.

II

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III

OPINION BELOW

The opinion creating the issue presented to this Court was rendered by the United States Court of Appeals for the Sixth Circuit:

John Malinovsky, Petitioner-Appellee, vs. Court of Common Pleas of Lorain County, Respondent-Appellant, No. 92-3691.

This opinion affirmed Judge Aldrich's opinion rendered in the United States District Court for the Northern District of Ohio which granted a writ of habeas corpus preventing a trial in this matter and thereby thwarting the judgment of the Ohio Supreme Court rendered in State v. Malinovsky (1991), 60 Ohio St. 3d 20, 573 N.E. 2d 22.

IV

STATEMENT OF CLAIMED JURISDICTION

Jurisdiction is invoked under:

28 U.S.C. 1254 and

Supreme Court R. 10.1(C)

The United States Court of Appeals for the Sixth Circuit rendered its judgment in this case on October 25, 1993.

V

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb...

28 U.S.C. 2254

VI

STATEMENT OF THE CASE AND FACTS

On March 9, 1989 a four count indictment was filed charging the Respondent with Extortion, Perjury, Obstructing Official Business, and Interfering with Civil Rights.

The theory of the State's case was that Sgt. Wayne Long was sent by the Respondent, who was Chief of Police of the City of Lorain, Ohio, to threaten, pressure, intimidate, and extort two fire inspectors into "overlooking" fire code violations. These violations existed at a bingo parlor that was scheduled to open in the immediate future and could not legally do so as a result of the fire code violations. It was economically infeasible to remedy these violations. The bingo game was operated by the Respondent's daughter,

Janice Malinovsky, for the benefit of the Society for Prevention of Cruelty to Animals.

The Petitioner sent Det. Sgt. Wayne Long to pressure the fire inspectors. Long was convicted after trial, sent to a halfway house instead of prison, pardoned, and still serves on the Lorain Police Department.

The State's case was based upon statements Sgt. Long made to the fire inspectors. These statements were to be adduced into evidence through the testimony of fire inspectors Cuevas and Thomas and through a tape of a phone conversation which took place between fire inspector Thomas and Sgt. Long. The testimony and tape were proffered into the record of the trial court.

The proffered exhibits clearly implicated the Respondent as Chief of Police and father of the operator of the

bingo game. The proffered exhibits clearly indicate the extortionate acts committed by Wayne Long were at the behest, direction, and control of the Respondent.

It was the State's position that the statements made by Sgt. Long were made in the furtherance of a conspiracy and were in fact the criminal acts which were the sole purpose and goal of the conspiracy. Realizing that this evidence was the essence of it's case, the State made every effort to bring the issue of admissibility of these statements to light prior to trial so that an adverse ruling could be appealed. In light of the State's burden, the Respondent made every effort to thwart the State's legitimate right to appeal an adverse ruling on this evidentiary hurdle.

The docket is replete with efforts on behalf of the State to raise these evidentiary issues prior to trial. The defense first raised its objections to the adduction of this evidence at trial. Under Ohio law, regardless of what label is used, an objection that prohibits the adduction of the evidence in the State's case is a motion to suppress. Under Ohio law motions to suppress must be raised prior to trial.

The trial court repeatedly sustained Respondent's objections and prohibited the State from mustering its proof. Finally, as a result of the court's rulings, the State filed a midtrial notice of appeal contesting the suppression of the State's case. Pursuant to Ohio law, this notice divested the trial court of jurisdiction to dismiss this case.

The Respondent moved for an acquittal. The trial court entered a dismissal for want of prosecution. Eventually, the Ohio Supreme Court, in State v. Malinovsky (1991), 60 Ohio St. 3d 20, 573 N.E. 2d 22, cert. denied (1991) _____ U.S. _____, 112 S. Ct. 582, 116 L.Ed. 2d 607, reversed holding that

> Today, we are asked whether double jeopardy bars retrial where a trial court, after ruling on a defendant's objection to the evidence crucial to the state's case, erroneously precluded the state from taking a Crim. R. 12(J) appeal and subsequently dismissed the criminal charges for a failure to prosecute. Because the Crim. R. 12(J) appeal and the subsequent dismissal for failure to prosecute were precipitated by the defendant's objection in light of Scott and Calhoun, we hold that the double jeopardy clause does not bar re-prosecution where a criminal prosecution is dismissed for a failure to prosecute after the trial court has erroneously required the state to proceed with trial despite the state's properly filed Crim. R. 12(J) appeal. [Emphasis added.]

State v. Malinovsky (1991), supra at 24, 26.

Immediately before the trial was to recommence, the Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. Jurisdiction was invoked under 28 U.S.C. 2254 (a) and (b). The district court found that the Respondent had exhausted all state remedies and was in "custody." Judge Aldrich properly held that the termination of the trial was the "functional equivalent of a mistrial" but held contrary to the Ohio Supreme Court's finding that the actions were "precipitated by the defendant's objection." Judge Aldrich held that as a federal court sitting in habeas corpus review, that she was entitled to and did apply the standard of a de novo review

despite the mandates of 28 U.S.C. 2254(d).

The United States Court of Appeals with one judge dissenting upheld Judge Aldrich and also found that the "defendant himself has not voluntarily sought to terminate the proceedings prior to a determination of factual guilt or innocence." Malinovsky v. Court of Common Pleas, (6th Cir. 1993), No. 92-3691 at 18.

Neither the District Court or the Court of Appeals engaged in the analysis required by 28 U.S.C. 2254(d) which requires the factual determination of the state supreme court to be upheld unless those factual determinations are specifically found to lack fair support in the record.

Both the United States District Court and United States Court of Appeals for the Sixth Circuit held that the

Respondent was entitled to this particular jury and rejected the argument of the Petitioner that this jury should be brought back and reseated. The majority of the United States Court of Appeals found this to be "impractical." Judge Siler dissented and reasoned that since the dismissal was void for lack of jurisdiction and a nullity, the jury should be brought back to see if they in fact had been "tainted". The Respondent would then have his choice of proceeding under the circumstances or moving for a mistrial which he would view as due to manifest necessity and therefore not barring a retrial.

VII

A.

ARGUMENT

All parties and courts agree in this case that the trial court's action

in dismissing the case for want of prosecution was the functional equivalent of a mistrial. The disagreement arises from the fact that the Ohio Supreme Court has factually found that the events that led up to the dismissal of this case were "precipitated by the defendant's objection in light of Scott and Calhoun." The Ohio Supreme Court further held

> that the double jeopardy clause does not bar re-prosecution where a criminal prosecution is dismissed for a failure to prosecute after the trial court has erroneously required the State to proceed with trial despite the State's properly filed Crim. Rule 12(J) appeal.

State v. Malinovsky (1991), 60 Ohio St. 3d 20 at 24, 25-26, 573 N.E. 2d 22, cert. denied (1991) _____ U.S. _____, 112 S. Ct. 582, 116 L.Ed. 2d 607.

The District Court applied a de novo standard of review. The United

States Court of Appeals for the Sixth Circuit upheld this review.

Neither court followed the dictates of 28 U.S.C. 2254(d) which required a review of the record to ascertain if the factual determination made by the Ohio Supreme Court finding that the Respondent precipitated the dismissal lacked even fair support in the record. Marshall v. Longberger (1983), 459, U.S. 422 at 432, 103 S. Ct. 843 at 850; Sumner v. Mata (1981), 449 U.S. 539, 101 S. Ct. 764. As such, both the federal courts sitting in habeas corpus review of a state court decision exceeded their scope of authority.

The United States Court of Appeals for the Sixth Circuit literally begged this issue on page 18 of their Opinion when it opined:

> Appellant further submits 'that there is no reason to conclude that this Petitioner would be unjustly treated with

> a new jury properly selected than any other defendant facing a retrial.'
>
> (Appellant's brief, p. 23). This statement ignores one of the policies underlying the double jeopardy clause. That policy is not to avoid "unjust treatment," but rather to protect the defendant in his right to have the first jury impaneled make a determination of his guilt or innocence and to bring closure to the proceedings. See United States v. Cameron, 953 F. 2d 240, 243 (6th Cir. 1992). This protection must be afforded, provided that the defendant himself has not voluntarily sought to terminate the proceedings prior to a determination of factual guilt or innocence. [Emphasis added].

This is exactly what happened. This is exactly what the Ohio Supreme Court determined has happened. In so reasoning, the Court of Appeals has unilaterally and improperly imposed its interpretation of the facts upon the Ohio Supreme Court.

The Petitioner took many steps to cause the Respondent to lodge his

objection prior to trial. Under Ohio law, such objection was a motion to suppress pursuant to the dictates of State v. Davidson (1985), 17 Ohio St. 3d 132, 477 N.E. 2d 1141. The Respondent refused to do so in an effort to defeat the State's appellate rights which were then recognized to only apply pretrial, pursuant to Ohio Crim. R. 12(J).

The Petitioner specifically charged:

> It is the position of the State that the practice set forth in the Criminal Rule 12 is to facilitate the administration of justice and the flow of a criminal trial. The defense is willfully ignoring the State's notice of intention to use evidence and the mandates of Criminal Rule 12 that come into play upon the filing of such notice. The defense is taking such action in an effort to defeat the appellate rights granted the State pursuant to Ohio Criminal Rule 12(J). Such conduct is not only inconsiderate to the court but will result in the delay of trial, and if this court should rule against the State,

perhaps even attempt to perfect a mid-trial appeal.

State of Ohio's Motion to Compel the Defense to File Objections, (filed prior to trial).

The purpose of cloaking a motion to suppress as an objection is to defeat the State's right to a pretrial appeal on a motion to suppress if the defendant prevails. Until State v. Malinovsky, supra, Ohio did not recognize any right of the state to appeal the granting of a motion to suppress in other than a pretrial situation.

The Petitioner therefore consciously embarked upon a course of conduct that predictably would and did end in a midtrial appeal as a result of his waiting to lodge his objection/motion to suppress until midtrial.

Despite the State's efforts to raise this issue before trial and avoid

the predicted and now successful midtrial appeal, the Respondent claimed surprise in his Petition for a Writ of Habeas Corpus that such a midtrial appeal (although clearly permissible under the language of Ohio Revised Code Section 2945.67 and Ohio Criminal Rule 12(J) at the time of the trial), became a reality in this case. (Petition for a Writ of Habeas Corpus at 5 paragraph B).

The filing/lodging of a motion to suppress that resulted in an anticipated and predicted midtrial appeal is

> a significant level of participation by the defendant in bringing about a termination of his trial prior to the determination on the merits.

United States v. Dahlstrum (9th Cir. 1981), 655 F. 2d 971 at 975-6.

If the Respondent truly desired his case to be efficiently handled by the original jury, then he should have filed

his Motion to Suppress prior to trial as the Ohio Rules of Criminal Procedure require and not risk the predicted midtrial appeal.

The Ohio Supreme Court is well aware of the scheme created by statutes and the promulgation of the criminal rules in Ohio that require motions to suppress to be lodged prior to trial. The Respondent's refusal to do so was a conscious effort to thwart this scheme and the appellate rights of the State of Ohio. When viewed from this perspective, the Ohio Supreme Court's finding that the Respondent precipitated the events that led to the dismissal of this case was fairly supported by the record.

The reason Congress has sought to create comity through the promulgation of 28 U.S.C. 2254 (Sumner v. Mata, supra at 549-550, 770-771) and required

deference to factual determination by the state courts is illustrated by the ruling of the district court and the federal court of appeals in this matter.

The decision in State v. Malinovsky, Id. permitting midtrial appeals was the final step in the development of the law attempting to alleviate the disparity in the appellate rights between the accuser and the accused. The ruling of the district court and the affirmance of that ruling by the court of appeals, as a result of the failure to afford the proper deference to such a factual finding as required by federal case law in 28 U.S.C. 2254, has emasculated this final development in law. This holding, if permitted to stand, will permit/encourage future defendants to continue to cloak their motions to suppress in labels such as trial

objections in an effort to improperly invoke double jeopardy protection.

If not a factual determination, the Ohio Supreme Court's finding that the "functional equivalent of a mistrial" was caused by the midtrial lodging of the motion to suppress was a procedural determination. The district court should have been bound by that determination. Duffel v. Dutton (6th Cir. 1986), 785 F. 2d 131.

> We believe it is clear from the language of Burks that the double jeopardy clause did not prevent a second trial of a habitual offender charged in the present case. The Tennessee Appellate Court determined that the trial court had committed error in excluding proper evidence. A federal court must accept a state court's interpretation of that state's statutes and rules of practice. Hutchinson v. Marshall , 744 F. 2d 44, 46 (Sixth Cir. 1984), cert. denied, _____ U.S. _____, 105 S. Ct. 1208, 84 L.Ed. 2d 350 (1985).

Duffel v. Dutton, supra at 133.

B.

In this case, both the United States Court of Appeals and the United States District Court found that the functional equivalent of a mistrial that resulted in the termination of this case was not caused by the prosecution. Regardless of whether this Court accepts the finding that the dismissal in this case was precipitated by the Respondent, it is clear that the events occurred as a result of the Respondent attempting to seek strategic advantage at trial by prohibiting the adduction of the State's evidence. It is also undisputed that the Respondent sought to obtain this strategic advantage during trial and did not choose to utilize the avenues available to him or even required of him pursuant to the Ohio Criminal Rules.

The Double Jeopardy Clause is not offended by the retrial of the

Respondent because his case was terminated prior to reaching a determination of his factual guilt or innocence. He was not acquitted.

The functional equivalent of a mistrial in this case should be even less repugnant to the Constitution since it was entered by a court that had no jurisdiction to do so. As Circuit Judge Siler stated in his dissent on page 20, the "The trial court was without jurisdiction to take further action, so any dismissal was null and void." Therefore, this case is technically still pending. As he reasoned, the jury should be brought back in this case whether it is "impractical" or not. Justice is not always a practical or easily obtained commodity. If the defense does not want to retry the case to the same jury or it cannot be reconstituted, then the mistrial would

be granted as a result of manifest necessity pursuant to Arizona v. Washington 434 U.S. 497 at 509, 98 S. Ct. 824 at 832, (1978).

Under these circumstances, the Double Jeopardy Clause is not offended by an error made by a trial court as a result of an accused seeking to obtain strategic advantage at a trial. Certainly the evolution of the case law interpreting the Double Jeopardy Clause has reached the point where it is permissible to retry people today that could not have been tried in the past. There is no language in the Double Jeopardy Clause which prohibits the continuation of this trial even if it has to be with another jury when the mistrial was not caused by the prosecution.

There has been no determination of the factual guilt or innocence of the

Respondent. The State has not been given an opportunity to muster its proof and have it placed before the trier of fact. It is clear that the law is evolving to interpret the Double Jeopardy Clause as to not apply to situations wherein the State has not had a full and fair opportunity to present its case as a result of conduct on behalf of the Respondent. Linam v. Griffin (10th Cir. 1982), 685 F. 2d 369; Duffel v. Dutton, supra.

In many trials, courts err. When they err as a result of an accused's attempt to obtain strategic advantage, retrial should not be prohibited where the State is not at fault. The balance struck by the Double Jeopardy Clause between society's right to bring an offender to justice and the accused's right to a determination of his guilt or innocence by the original tribunal

should be re-examined and re-defined under these circumstances.

An accused has never been promised a perfect trial. Errors occur and are inherent in our system of justice. It is not unconstitutional to retry a defendant where a trial court erred, through no fault of the prosecution, when ruling upon an objection lodged by the defendant.

The possibility of error is a risk inherent in the lodging of such an objection. The consequences therefrom should not uniquely inure only to the benefit of the defendant. An accused should not reap a windfall from an objection that has been improperly decided. An accused should not be heard to prevail upon an erroneous dismissal that was granted as a result of the state being erroneously prevented from offering its proof into evidence. This

is especially true where the dismissal was entered without jurisdiction of the court and in contravention of a properly filed notice of appeal.

The double jeopardy clause should no longer be interpreted to prohibit retrial where the State has not had a full and fair opportunity to muster its proof and there has been no factual determination of the accused's guilt or innocence. More importantly, in this case the double jeopardy clause should not be interpreted to prohibit the continuation of the original trial in this case which was not yet completed and which was dismissed without jurisdiction. Under these circumstances it should be irrelevant whether the trial can be continued with the original jury impaneled or otherwise.

CONCLUSION

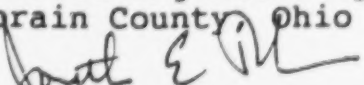
This case presents this Court with the opportunity to limit the scope of federal habeas corpus review of state court decisions and their factual determinations. It presents an opportunity to preserve comity between the United States and state court decisions thereby preserving the federal system and not unnecessarily duplicating judicial efforts.

More importantly, it permits this Court to take another step in the evolution of the case law concerning interpretation of the double jeopardy clause. It presents this Court with the opportunity to more fairly balance the needs and right of society to bring offenders to justice with the rights of those accused. The double jeopardy clause should no longer be interpreted to prohibit society from obtaining justice resulting from mistrials that were not caused by the prosecution. Clearly, errors by courts occur. They should not serve as a windfall to an accused attempting to seek strategic advantage at trial when a court erroneously and without jurisdiction enters a dismissal as a result of sustaining trial objections

that prohibited adduction of any evidence by the State.

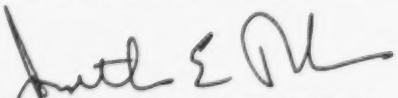
Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jonathan E. Rosenbaum hereby certify, pursuant to U.S. Sup. Ct. R. 29 that three copies of the foregoing Petition for Writ of Certiorari to The Supreme Court of Ohio were sent to Daniel Wightman, 110 Moore Road, Avon Lake, Ohio 44012 on this 21 day of January, 1994 by depositing the three copies in a United States mail box with first class postage affixed thereto.



JONATHAN E. ROSENBAUM
Chief Counsel,
Criminal Division

APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 92-3691

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN MALINOVSKY,
Petitioner-Appellee,

v.

COURT OF COMMON PLEAS
OF LORAIN COUNTY,
Respondent-Appellant.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed October 25, 1993

Before: KENNEDY and SILER, Circuit Judges; and BERTELSMAN, Chief District Judge.*

BERTELSMAN, Chief District Judge, delivered the opinion of the court, in which KENNEDY, Circuit Judge, joined. SILER, Circuit Judge (pp. 20-21), delivered a separate dissenting opinion.

*The Honorable William O. Bertelsman, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

BERTELSMAN, Chief District Judge. This is an action for writ of habeas corpus based upon the Double Jeopardy Clause of the Fifth Amendment.

The United States District Court for the Northern District of Ohio, Eastern Division, granted petitioner his requested writ. This matter is now before this court on appeal filed by the appellant/respondent, Court of Common Pleas of Lorain County. We affirm the district court's decision.

I.

The rather involved factual and procedural background of this case is clearly and concisely set forth in District Judge Ann Aldrich's June 12, 1992, memorandum and order. Rather than reinvent the wheel, we rely heavily on Judge Aldrich's opinion. *Malinovsky v. Court of Common Pleas Lorain County, Ohio*, No. 1:92VC0355, 1992 WL 164433, *1-*6 (N.D. Ohio June 12, 1992).

The facts of this case are not contested.

Malinovsky, who is presently free on bond set in the state court, filed this habeas corpus petition on February 29, 1992, pursuant to 28 U.S.C. § 2254. Malinovsky contests the constitutionality of his custody by the State of Ohio and seeks to prevent his retrial after the State aborted its previous trial against him prior to verdict.

Malinovsky has exhausted all of his state remedies, which he must do before petitioning for a writ of habeas corpus. 28 U.S.C. § 2254(b). Also, although Malinovsky is entitled to relief only if he is "in custody," 28 U.S.C. § 2254(a), this prerequisite has been met because Malinovsky is in custody, although he has been released on a personal recognizance bond. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 104 S. Ct. 1805, 80 L. Ed. 2d 311 (1984). Thus, Malinovsky's petition is properly within the jurisdiction of the district court.

At all times relevant to this case, Malinovsky was the Chief of Police for the City of Lorain. On March 9, 1989, Malinovsky was charged in a four count indictment with: 1) extortion, 2) perjury, 3) obstructing official business, and 4) interfering with civil rights. These four charges all relate to threats allegedly made by Malinovsky to certain Lorain fire inspectors, in order to prevent the fire inspectors from citing a bingo parlor for violations of the fire code. The bingo parlor was operated by Malinovsky's daughter.

The State did not allege that Malinovsky threatened the fire inspectors directly. Rather, the State alleged that Lorain police detective sergeant Wayne Long communicated these threats to Lorain fire inspectors Anthony Cuevas and Roger Thomas at Malinovsky's request. Long threatened to have Cuevas and Thomas falsely charged with criminal conduct if they did not overlook the fire code violations. After Long communicated these threats to Cuevas and Thomas, the two fire inspectors informed their fire chief, who in turn brought Long's conversations to the attention of the Lorain county prosecutor. The county prosecutor then instructed Cuevas and Thomas to tape-record their next conversation with Long. Thomas succeeded in tape-recording a subsequent telephone conversation he had with Long, during which Long implicated Malinovsky as the instigator of the threats.

With this evidence, the State brought criminal charges against Long and Malinovsky. The two defendants were tried separately, with Long's trial first. In large part due to the tape-recorded conversation, Long was found guilty of tampering with evidence. However, Long was subsequently pardoned by Governor Celeste, and continues to serve on the Lorain Police Department.

In its case against Malinovsky, the State also intended to prove Malinovsky's guilt by introducing Thomas's tape-recorded conversation with Long. Besides Thomas's testimony about the tape recording, the State also intended

to have Cuevas testify as to what Long said Malinovsky had said. Anticipating that the tape-recording and Thomas's testimony could be construed by the trial court to be inadmissible hearsay, the State made numerous attempts to raise the issue prior to trial; or, more accurately, the State tried to force Malinovsky to raise the issue prior to trial by forcing Malinovsky to file a motion to suppress.[1] For example, the State filed a "notice of intention to use evidence," admittedly in the hope that this notice would cause Malinovsky to file a motion to suppress. Malinovsky, however, did not respond. The State then filed a motion to compel Malinovsky to file objections. That motion was overruled by the trial court.

The State freely admits that its pretrial efforts to raise the hearsay issue were made in order to allow the State to take an immediate appeal, pursuant to Ohio Crim. R. 12(J), in the event that the State received an adverse ruling on the admissibility of the evidence. Rule 12(J) provides in pertinent part:

> The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

---

[1] At oral argument before this court, appellant's counsel was questioned as to why the State did not itself file a motion in limine, rather than trying to force appellee to file a motion to suppress. Under Ohio law the trial court's ruling on a motion in limine is considered a tentative, interlocutory order and is therefore not immediately appealable. *See State v. Grubb*, 503 N.E.2d 142, 145-46 (Ohio 1986).

As mentioned, however, the State's efforts to obtain a pretrial ruling on the admissibility of its evidence were unsuccessful, so it had no opportunity to take a pretrial appeal pursuant to Rule 12(J).

On June 6, 1989, the Lorain County Court of Common Pleas impaneled a jury and the case proceeded to trial. On June 8, 1989, the State questioned fire inspector Cuevas about the conversation he had had with Long, in which Long allegedly made comments relating to what Malinovsky had said. Malinovsky objected to the introduction of Cuevas's testimony as inadmissible hearsay. The State argued that the testimony fell under the coconspirator exception to the hearsay rule, and was therefore admissible. The trial judge, finding that an insufficient foundation had been laid for admission of the evidence under the coconspirator exception to the hearsay rule, sustained Malinovsky's objection.

A recess followed, and the State filed a notice of appeal to Ohio's Ninth District Court of Appeals, pursuant to Ohio Crim. R. 12(J). The State averred that the trial court's ruling had effectively eviscerated the State's case against Malinovsky, and that the appeal was not being taken for purposes of delay. After the recess, however, the trial court insisted that the State continue with its case, despite the State having filed its appeal.

In compliance with the trial court's direction to proceed, the State called to the witness stand fire inspector Thomas, and attempted to elicit from him testimony about the tape-recorded conversation he had had with Long. Once again, Malinovsky objected to the introduction of Thomas's testimony as inadmissible hearsay, and the State argued that the testimony fell within the coconspirator exception to the hearsay rule. The trial court again sustained Malinovsky's objection, and refused to permit the State to play the tape-recorded conversation for the jury.

Following these rulings, the trial court took another recess in order to hold a conference with the parties in chambers. During that conference, the State took the position that the trial court's evidentiary rulings were tantamount to a suppression and that pending the resolution of the State's appeal, the trial court was deprived of further jurisdiction. The State also maintained, in response to a question from the trial court, that "[t]he State is not in a position to proceed with any degree of prosecution based upon the evidence, evidentiary rulings; and to call any other witnesses would be absolutely futile." Trial transcript at 197-98.

After the State made clear that it would not call any further witnesses, Malinovsky moved for a judgment of acquittal under Ohio Crim. R. 29. In response to Malinovsky's motion for acquittal, the State's attorney declared: "Well, I'd like it clear that I have not rested, and don't feel that anybody can do anything after I filed the notice of appeal at this level." *Id.* at 199. However, the trial court ruled that "the appeal that has been taken is not a final order; and any attempt to perfect such an appeal is not of any legal force or effect; and, therefore, I hadn't made any order on the prosecuting attorney's office, but I had requested that you proceed with evidence in this case." *Id.* at 199-200.

Accordingly, the trial court resumed proceedings before the jury, and directed the State to call its next witness. Consistent with the position that it had taken during the conference in chambers, the State declared that it had no further witnesses, but declined to rest. The trial court then retired the jury, and further discussion ensued between the trial court and both parties.

During the course of those discussions, the trial court reminded the State that only one of the four charges against Malinovsky was a conspiracy count (count four), and then asked the State whether it had any separate evidence concerning the other three counts. The State responded that to prove the three other charges, it

intended to rely on the same evidence that the trial court had previously ruled inadmissible, so the State could not go forward on those charges, either. Malinovsky reacted by moving for a judgment of acquittal.

The trial court reiterated that after reviewing the law and the evidence, it remained convinced that the evidence in question was inadmissible because no foundation had been laid to bring it within the coconspirator exception to the hearsay rule. However, the trial court was reluctant to enter a judgment of acquittal, and dismissed the case for want of prosecution. The record reads:

> THE COURT: At this juncture, the court finds that there is an unwillingness on the part of the State to proceed with its case. As the court indicated yesterday, the prosecution cannot be in a position to frustrate the legitimate interests of the court in completing the lawsuit.
>
> The court will not grant any stay and continue this trial indefinitely. The court finds further that it would be inappropriate to render a judgment of acquittal for the defendant.
>
> Rather, the court will enter a dismissal of the charges for want of prosecution on behalf of the State. The court, in making this determination, finds that only one of the four counts charged in the indictment relates to the conspiracy.
>
> That means that the State's burden is to prove by evidence which convinces the jury beyond a reasonable doubt all of the essential elements of the crimes of extortion, perjury and the misdemeanor offense of obstruction of the performance of the duties of a public official.
>
> Whether or not the evidence of conspiracy relates to those matters is not at issue because there is no such evidence been [sic] admitted into this

> trial. And whether or not the court's decisions are in accordance with the applicable case law is not a matter for review by any party other than the appellate court.
>
> And, therefore, this court will journalize its entry. And the only entry the court will journalize is that this case will be dismissed for want of prosecution by the State. We'll stand in recess.
>
> THE BAILIFF: Court is recessed.
>
> MR. SMITH [FOR MALINOVSKY]: I would like to state for the record that we object to the judge's ruling about a dismissal. We feel it should have been a verdict of acquittal, because the State had effectively rested and a jury was empaneled; and, therefore, an acquittal should ensue, and a verdict should be granted because they failed to prove their case.

Id. at 209-10.

After this colloquy, the trial court recalled the jury, advised the jurors that "for reasons that do not concern you at this time, the court has decided to dismiss for want of prosecution [the] charges against the defendant," and dismissed the jury. *Id.* at 210-11. The trial court then journalized its entry of dismissal for want of prosecution. *State v. Malinovsky*, No. 89-CR-037121, slip op. (Lorain County Ct. Common Pleas June 6, 1989).

The State then appealed the trial court's dismissal of the action for want of prosecution. The Ohio Court of Appeals dismissed the State's appeal, holding that a mid-trial appeal of an adverse evidentiary ruling by the State was not permitted under Ohio Crim. R. 12(J). *State v. Malinovsky*, No. 89-CA-004592, slip op. at 5 (Ohio Ct. App. Dec. 27, 1989). The Ohio Court of Appeals further held that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as well as

section 10, article I, of the Ohio Constitution, barred further proceedings against Malinovsky. *Id.* at 8.

The State then pursued an appeal to the Ohio Supreme Court. The Ohio Supreme Court reversed. With respect to the mid-trial appeal issue, the Ohio Supreme Court stated:

> Under Crim.R. 12(J) the state must certify that the appeal is not taken for the purpose of delay and that the complained-of ruling destroys the state's case. Because the state certifies that the ruling destroys its case, the ruling is, in essence, a final order.

State v. Malinovsky, 573 N.E.2d 22, 25 (Ohio), *cert. denied*, ___ U.S. ___, 112 S. Ct. 582, 116 L. Ed. 2d 607 (1991). With respect to the double jeopardy issue, the Ohio Supreme Court cited *United States v. Scott*, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978), and *State v. Calhoun*, 481 N.E.2d 624 (Ohio), *cert. denied*, 474 U.S. 983, 106 S. Ct. 391, 88 L. Ed. 2d 343 (1985), and held:

> In *Scott*, the United States Supreme Court held that double jeopardy protection is not absolute until there is a dismissal or acquittal based upon a factual finding of innocence. *Scott* ultimately held that retrial is permissible after the guarantee against double jeopardy has attached where the defendant has sought a termination of the proceedings on grounds other than the state's failure of proof. Similarly, in *Calhoun*, we held that retrial was not barred by the Double Jeopardy Clause where a trial court erroneously dismissed an indictment at trial on the grounds that the statute establishing the crime was unconstitutionally vague.
>
> Today, we are asked whether double jeopardy bars retrial where a trial court, after ruling on a

> defendant's objection to evidence crucial to the state's case, erroneously precluded the state from taking a Crim.R. 12(J) appeal and subsequently dismissed criminal charges for a failure to prosecute. Because the Crim.R. 12(J) appeal and subsequent dismissal for failure to prosecute were precipitated by the defendant's objection, in light of *Scott* and *Calhoun*, we hold that the Double Jeopardy Clause does not bar reprosecution where a criminal prosecution is dismissed for failure to prosecute after the trial court has erroneously required the state to proceed with trial despite the state's properly filed Crim.R. 12(J) appeal.

Id. at 25-26 (citations omitted).

The Ohio Supreme Court then remanded the action to the Ohio Court of Appeals for a determination of whether the trial court's evidentiary ruling had been erroneous. Malinovsky's petition for a writ of certiorari in the United States Supreme Court was denied. *Malinovsky v. Ohio*, ___ U.S. ___, 112 S. Ct. 582, 116 L. Ed. 2d 607 (1991). On remand, the Ohio Court of Appeals found that the trial court had erred in excluding the State's evidence and remanded the case to the trial court for further proceedings. *State v. Malinovsky*, No. 89-CA-004592, slip op. at 6 (Ohio Ct. App. Oct. 16, 1991). Malinovsky's motion to the Ohio Supreme Court for leave to appeal the order of the Court of Appeals on remand was dismissed. *State v. Malinovsky*, No. 91-2482, slip op. (Ohio Feb. 19, 1992).

This petition for a writ of habeas corpus followed. Since the filing of this petition, the state court action has been assigned to a different trial judge, *State v. Malinovsky*, No. 91-AP-194, slip op. (Ohio Apr. 6, 1992), and the district court stayed the state court proceedings until it could act upon Malinovsky's petition. Order dated April 29, 1992.

II.

The district court reviewed the report and recommendation submitted by the magistrate judge. The district judge agreed with the magistrate's conclusions that (1) Malinovsky's due process rights were not violated by the State's mid-trial appeal, and (2) Malinovsky's retrial is barred by the Double Jeopardy Clause. It is only this latter ruling that the Appellant appeals to this court. The district court concluded that, after the state trial court in mid-trial entered a dismissal for want of prosecution of the first case and discharged the jury, any attempt by the State of Ohio to now retry Malinovsky violates the Double Jeopardy Clause. The reasoning of the district court is sound and its ruling is AFFIRMED.

III.

The Double Jeopardy Clause states that "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. There is settled Supreme Court authority as to the general boundaries of the Double Jeopardy Clause, the primary case being *United States v. Scott*, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978). *Scott* sets out the parameters of the Clause. If a defendant receives a judgment of acquittal, in most circumstances that judgment may not be appealed. However, if a defendant is convicted and then succeeds in reversing the conviction on appeal on any basis other than insufficiency of evidence, he may be retried without violating the Clause. *Id.* at 90-91, 98 S. Ct. at 2193-94.

The Double Jeopardy Clause may also be implicated even in situations where there has been no final determination of guilt or innocence. *Id.* at 92, 98 S. Ct. at 2194. Such occurred in the case *sub judice* when the state trial judge dismissed the case for want of prosecution without there being either a verdict from the jury or a judgment from the court based upon insufficiency of the evidence.

The Supreme Court has noted two types of situations where there has been no final determination of guilt or innocence in a case, yet the Double Jeopardy Clause prevents retrial. Those are (1) where the trial judge "terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence," and (2) where the trial judge "declares a mistrial." *Id.*

The district court determined that the action by the state court judge in dismissing for want of prosecution and discharging the jury was essentially a "mistrial."[2] We agree. The defendant demanded acquittal on the ground that the prosecution had insufficient admissible evidence. The prosecution took the position that the trial court had no jurisdiction to do anything. Joint Appendix, pp. 103-04. The trial court, in an attempt to avoid ordering an acquittal, dismissed the indictment for want of prosecution and discharged the jury. Joint Appendix, p. 105. In essence, this was a mistrial.[3]

Whether a criminal defendant can be retried without violating the Double Jeopardy Clause after a mistrial has been declared depends in part upon who sought the mistrial. *United States v. Scott*, 437 U.S. 82 (1978), sets forth the double jeopardy consequences when a mistrial is declared. If the *defendant* "successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial," a retrial may still be had. *Scott*, 437 U.S. at 93, 98 S. Ct. at 2195; *United States v. Cameron*, 953 F.2d 240, 243 (6th Cir. 1992).

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[2]The state trial judge entered a dismissal for want of prosecution. However, federal courts are not bound by a state judge's characterization of his own actions. *Scott*, 437 U.S. at 96, 98 S. Ct. at 2196-97; *United States v. Sisson*, 399 U.S. 267, 290, 90 S. Ct. 2117, 2130, 26 L. Ed. 2d 608 (1970).

[3]A mistrial is defined as a trial which has been terminated prior to its normal conclusion because of some extraordinary event, prejudicial error that cannot be corrected at trial, or a deadlocked jury. *Black's Law Dictionary* 1002 (6th ed. 1990).

But when a mistrial is declared "at the behest of the prosecutor or *on the court's own motion*, . . . 'the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him,' [is balanced] against the public interest in insuring that justice is meted out to offenders." *Id.* at 92, 98 S. Ct. at 2194 (quoting *Downum v. United States*, 372 U.S. 734, 736, 83 S. Ct. 1033, 1034, 10 L. Ed. 2d 100 (1963) (emphasis added)). Under this latter circumstance, the Double Jeopardy Clause is not offended and a retrial is not prohibited if there existed a *manifest necessity* for declaring a mistrial. *Arizona v. Washington*, 434 U.S. 497, 505-06, 98 S. Ct. 824, 830-31, 54 L. Ed. 2d 717 (1978); *Glover v. McMackin*, 950 F.2d 1236, 1242 (6th Cir. 1991); *United States v. White*, 914 F.2d 747, 754 (6th Cir. 1990); *Hamm v. Jabe*, 706 F.2d 765, 767 (6th Cir. 1983); *United States v. Bridewell*, 664 F.2d 1050, 1051 (6th Cir. 1981).[4]

IV.

Appellant argues on appeal that a retrial may be had because the mistrial was actually caused by the actions of petitioner. In support of its argument that appellee "caused" the functional equivalent of a mistrial, appellant argues that Malinovsky deliberately and "consciously embarked upon a course of conduct that predictably would and did end in midtrial appeal as the result of his falsely labeling his motion to suppress the evidence as a trial objection." (Appellant's brief, p. 15). Thus, appellant points to the fact that Malinovsky refused to file a motion to suppress and instead waited until the hearsay testimony was offered during trial to object. This intentional conduct, argues appellant, led to the appeal and indirectly to the dismissal, and therefore amounts to causing the mistrial.

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[4]Ohio law also recognizes that the trial court's discharge of an impaneled jury implicates jeopardy absent an absolute, imperative necessity. *See generally* 25 O. Jur. 3d, *Criminal Law* § 389 (1981).

The decisions imposing upon a defendant the responsibility for a mistrial usually involve more direct action by a defendant, such as where a defendant actually moves for a mistrial. "[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's *motion* is necessitated by a prosecutorial or judicial error." *United States v. Jorn*, 400 U.S. 470, 485 (1971) (opinion of Harlan, J.) (emphasis added). "Such a *motion* by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *United States v. Scott*, 437 U.S. 82, 93 (1978) (emphasis added).

A plain reading of the factual and procedural history of this case reveals that Malinovsky did not move for a mistrial in his state court case. The record is void of any evidence that Malinovsky deliberately and voluntarily sought to have the court enter a dismissal so as to end the proceedings against him on anything other than a determination of his guilt or innocence. Rather, what Malinovsky did do was refuse to file a motion to suppress. Appellant tried to force Malinovsky to do so first by filing a notice of intention to use evidence (Joint Appendix, p. 92), but Malinovsky did not respond. Appellant then filed a motion to compel the defense to file objections (Joint Appendix, p. 94). This motion was overruled by the state trial court. Malinovsky then made an evidentiary objection to the hearsay testimony when it was offered at trial, which was sustained. He sought a judgment of acquittal when the State refused to call further witnesses, but the court twice refused to grant his request, choosing instead to dismiss for failure to prosecute.

Thus, in this case there was no actual motion by defendant. Appellant instead seeks to rely on a chain reaction of events as "causing" the mistrial, even though defendant did not actually move for a mistrial. However, the links in this chain are simply too weak to support an inference that appellee caused a mistrial.

Appellant relies upon *State v. Davidson*, 477 N.E.2d 1141 (Ohio 1985), to support its argument that appellee was aware of his responsibility to raise his evidentiary objections in the form of a pretrial motion to suppress and is therefore responsible for the mistrial. In *State v. Davidson* the court ruled that defendant's pretrial motion in limine to prohibit certain proof was, in reality, a motion to suppress evidence and that the granting of the motion made the State's case so weak that the order was a final order immediately appealable by the State. *Id.* at 1144-45. *Davidson* held "that any motion which seeks to obtain a judgment suppressing evidence is a 'motion to suppress' for purposes of R.C. 2945.67 and Crim.R. 12(J) where that motion, if granted, effectively destroys the ability of the state to prosecute." *Id.* But this argument overlooks the fact that, even if the defense objection was the equivalent of a motion to suppress, there was no manifest necessity for discharging the jury while it was resolved. *See* discussion *infra* part V.

V.

The decision of a trial judge to declare a mistrial is treated deferentially; however, the judge is required to exercise "sound discretion" in so declaring. *Arizona v. Washington*, 434 U.S. at 506 n.18, 98 S. Ct. at 831; *Glover v. McMackin*, 950 F.2d at 1242; *Hamm v. Jabe*, 706 F.2d at 767. Thus, on review, the inquiry is whether the trial court properly exercised discretion in determining that manifest necessity existed for the declaration of a mistrial. Respondent appears to concede that the judge acted unjustifiably. (Appellee should not "be permitted to profit from the trial court's *mishandling* of the situation the Petitioner consciously elected to cause." (Appellant's brief, p. 17) (emphasis added)).

In this case, the trial judge on his own volition dismissed for want of prosecution without considering other alternatives. Whether the trial court looked at alternative measures is considered in determining whether

proper discretion was exercised. *Glover v. McMackin*, 950 F.2d at 1242.

Granted, the circumstances presented to the judge in this case were unusual. The judge did not, however, stop to consider that the State's right to take a mid-trial appeal on the evidentiary ruling could be upheld.[5] He did not stop to consider that if the appellate courts were to hold that a mid-trial appeal is permissible, the evidentiary ruling would be given expedited appellate review. And he did not stop to consider whether a more appropriate action might have been to stay the proceedings, while the prosecution sought an expedited appeal.

Staying the proceedings while keeping the jury under the admonition would have been the more appropriate course, since a mid-trial appeal pursuant to Ohio Crim. R. 12(J) had never before been attempted, and an expedited review of the evidentiary ruling would occur if such a mid-trial appeal were held to be permissible. If this course had been pursued, the initial trial could have been brought to a resolution without implicating appellee's rights against double jeopardy. It is fallacious to blame the defendant for the trial judge's action in dismissing the jury.

The appellant argues that, because the Ohio Supreme Court ultimately held that its mid-trial appeal was valid, the trial court was without jurisdiction to undertake any action pending the appeal. There is an absence of case law on the issue of the validity of a trial court's actions

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[5]Under Ohio law, an appeal may be had only from a final order. Ohio Rev. Code Ann. § 2505.03-.04 (Anderson 1991). The trial court's ruling on a motion in limine or an evidentiary issue during trial is generally not considered a final order. *State v. Grubb*, 503 N.E.2d 142, 145-46 (Ohio 1986). However, adverse rulings on motions to suppress are appealable by the State under Ohio Crim. R. 12(J). The Ohio Supreme Court has held that determining whether something is a motion to suppress does not depend upon the label given the motion by the defendant. *State v. Davidson*, 477 N.E.2d 1141, 1144-45 (Ohio 1985) (holding that a motion in limine was in reality a motion to suppress, appealable by the State as a final order).

following what is ultimately held to be a permissible mid-trial appeal. But, as noted in the district judge's memorandum and order, while it may technically be true that the trial court was without jurisdiction, the State ignores the fact that the trial court did in fact continue to act and that the defendant's constitutional rights were implicated by those actions. The trial judge released the jury from the admonition. Even if he should not have done so, they were dismissed from further service on this case. At a minimum, the trial court probably did have jurisdiction to handle administrative matters pending the appeal, such as how to deal with the jury.[6]

Nor can it be successfully argued that appellee consented to the mistrial. Sixth Circuit precedent is clear that consent is implied only if there is some positive indication from the record of the defendant's willingness to consent to declaration of a mistrial. *Glover v. McMackin*, 950 F.2d 1236, 1240 (6th Cir. 1991). Malinovsky did not consent to the mistrial. In fact, Malinovsky objected to the trial court's dismissal. Joint Appendix, p. 104.

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[6]Ohio law recognizes that the trial court is not completely divested of jurisdiction once an appeal has been perfected. In general, the trial court retains jurisdiction over those matters not inconsistent with the appellate court proceedings. 4 O. Jur. 3d, *Appellate Review* § 246 (1978); *Yee v. Erie County Sheriff's Dep't*, 553 N.E.2d 1354, 1355 (Ohio 1990); *In re Kurtzhalz*, 48 N.E.2d 657, 659 (Ohio 1943).

In the case of appeals on grounds of double jeopardy, the courts almost uniformly hold that when an appeal is taken, the trial court retains jurisdiction to decide whether the appeal is frivolous, and if it determines that it is, to proceed to trial. *See Stewart v. Donges*, 915 F.2d 572, 574 (10th Cir. 1990) for a good discussion.

The situation here is analogous. There was no prior precedent for taking an appeal from an evidentiary ruling during trial. The Supreme Court of Ohio acknowledged as much. The trial court here treated the appeal as frivolous. As it turned out, the trial court was in error, but in the constitutional sense, it did not act in the complete absence of jurisdiction. The trial judge was in control of the jury, and he improperly discharged it. That discharge cannot be attributed to the defendant.

Appellant submits that any action by the trial judge was null and void. We disagree. The Ohio Supreme Court itself acknowledged that the trial court continued to act in the proceedings before it despite the fact that the State had appealed. In fact, the Ohio Supreme Court's holding that a retrial would not violate the Double Jeopardy Clause was based, not on the determination that the trial court's actions were null and void, but rather on its determination, relying on *United States v. Scott*, that it was Malinovsky and not the trial judge who had effectively terminated the proceedings on grounds other than guilt or innocence.

Appellant argues that the state court proceedings were "suspended" as a result of the appeal and, in essence, the second trial is not a "retrial" but instead a resumption of the initial proceedings. Appellant submits that the original jury panel can be called back to serve. This suggestion ignores the fact that the judge not only discharged the jury but also released them from their admonition. To now attempt a post-discharge resumption of the trial with the same jury as if nothing had occurred would be impractical.

Appellant further submits that "there is no reason to conclude that this Petitioner would be more unjustly treated with a new jury properly selected than any other defendant facing a retrial." (Appellant's Brief, p. 23). This statement ignores one of the policies underlying the Double Jeopardy Clause. That policy is not to avoid "unjust treatment," but rather to protect the defendant in his right to have the first jury empaneled make a determination as to his guilt or innocence and to bring closure to the proceedings. *See United States v. Cameron*, 953 F.2d 240, 243 (6th Cir. 1992). This protection must be afforded, provided that the defendant himself has not voluntarily sought to terminate the proceedings prior to a determination of factual guilt or innocence.

The decision of this court in *United States v. Bridewell*, 664 F.2d 1050 (6th Cir. 1981), illustrates that an error of the trial judge in declaring a mistrial can trigger the Double Jeopardy Clause, even though the prosecution is not at fault. This is what occurred here.

VI.

In conclusion, we observe that the issues on appeal are two-fold. First, was the petitioner responsible for the trial court's declaration of the functional equivalent of a mistrial? This issue is without merit, since one does not cause a mistrial by making a reasonable objection to testimony on the ground of hearsay or in failing to file a motion to suppress where there is no requirement that such a motion be made.

Second, was there a "manifest necessity" for the trial judge's decision to release the jury from its admonition while the prosecution sought an expedited appeal? If the trial court had attempted to stay the proceedings and keep the jury under its admonition but this had failed because the jury became tainted over a period of time, we would agree that retrial would not result in double jeopardy. But no such effort was made, and the state trial judge expressly released the jury from the admonition, thus causing an immediate taint, and rendering resumption of the trial before the same jury impossible as a practical matter.

Accordingly, the judgment of the district court is AFFIRMED.

SILER, Circuit Judge, dissenting. I respectfully dissent, for I believe that once the appeal was taken in the middle of trial, pursuant to Ohio Crim. R. 12(J), the trial court was without jurisdiction to take further action, so any dismissal was null and void.

Although this procedure under Rule 12(J) was apparently not utilized until this case, nevertheless, the Supreme Court of Ohio has approved this interlocutory appeal. *See State v. Malinovsky*, 573 N.E.2d 22, 25 (Ohio), *cert. denied*, 112 S. Ct. 582 (1991). Therefore, because such an appeal was authorized, even if it was the first ever effected, that divested the trial court of its jurisdiction to dispose of the case. *See Yee v. Erie County Sheriff's Dep't*, 553 N.E.2d 1354, 1355 (Ohio 1990); *State v. Watson*, 355 N.E.2d 883, 885-86 (Ohio Ct. App. 1975). The majority opinion has stated that the trial court is not completely divested of jurisdiction once an appeal has been perfected. Nevertheless, its jurisdiction is limited to those matters which do not directly affect the ability of the appellate court to decide the case. Thus, the dismissal of the case and the discharge of the jury would be acts which would prevent the appellate court from taking action on the issues before it. This is similar to the rule in the federal court system, which precludes the district court from taking any action disposing of a case while it is pending on appeal. *See, e.g., Showtime v. Covered Bridge Condominium Ass'n*, 895 F.2d 711, 713 (11th Cir. 1990).

The factual situation in *United States v. Scott*, 437 U.S. 82 (1978), is different, because there the defendant filed motions to dismiss both before and after the jury had been empaneled, and the court granted the motion at the close of all the evidence. In the case at bar, the defendant sought a judgment of acquittal, not a dismissal. Nevertheless, *Scott* stands for the proposition that where a case has been terminated without any determination of factual guilt or innocence, there may be situations in which the reprosecution of the defendant is not in

violation of the Double Jeopardy Clause of the Constitution.

In this case, I would find that the action of the trial court after the interlocutory appeal was taken was a nullity. Therefore, the dismissal of the case and the discharge of the jury were void and the trial court should notify the jurors to return to try the case. If they had been "tainted," in the meantime, by discussion of the case with others or in some other way, then the parties could have the choice of proceeding under the circumstances or moving for a mistrial. If a mistrial is granted, it likely would be due to "manifest necessity," *see Arizona v. Washington*, 434 U.S. 497, 509 (1978), and the trial court could then begin the trial anew. Therefore, I would reverse the action of the district court in granting the writ of habeas corpus.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN MALINOVSKY,	)	Case No. 1:92CV0355
	)	
Petitioner,	)	
	)	O R D E R
vs.	)	
	)	
COURT OF COMMON PLEAS LORAIN COUNTY, OHIO	)	
	)	
Respondent.	)	

ALDRICH, J.

The Court has filed its memorandum and order adopting the magistrate judge's report and recommendation, and granting the petition for a writ of habeas corpus. Therefore,

IT IS ORDERED, that the magistrate judge's report and recommendation is adopted, and the petition for a writ of habeas corpus is granted, and the case is dismissed.

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN MALINOVSKY,	)	Case No. 1:92CV0355
	)	
Petitioner,	)	
	)	MEMORANDUM AND ORDER
vs.	)	
	)	
COURT OF COMMON PLEAS LORAIN COUNTY, OHIO	)	
	)	
Respondent.	)	

ALDRICH, J.

In this action, John Malinovsky petitions the Court [sic] to issue a writ of habeas corpus, alleging that his continued custody by the State of Ohio is unconstitutional. The petition was referred to Magistrate Judge David S. Perelman for a report and recommendation, pursuant to local rule 5:1.2 and Fed. R. Civ. P. 72(b). The magistrate judge recommended that

Malinovsky's petition for issuance of a writ of habeas corpus be granted. The State filed objections to this recommendation, and Malinovsky has responded. Because the Court [sic] finds that the magistrate judge's report and recommendation is well-supported and that the State's objections are without merit, the Court [sic] adopts the magistrate judge's report and recommendation and grants Malinovsky's petition for a writ of habeas corpus.

I.

The facts of this case are not contested. They are repeated here, although they have already been fully set forth at pages 1 through 9 of the magistrate judge's report and recommendation. The recitation of the facts below is derived from the briefs and submissions of the parties, Malinovsky's state court trial

transcript, two opinions issued by the Ohio Ninth District Court of Appeals, and an opinion issued by the Ohio Supreme Court.

Malinovsky, who is presently free on bond set in the state court, filed this habeas corpus petition on February 29, 1992, pursuant to 28 U.S.C. Section 2254. Malinovsky contests the constitutionality of his custody by the State of Ohio and seeks to prevent his retrial after the State aborted its previous trial against him, prior to verdict.

The Court notes that Malinovsky has exhausted all of his state remedies, which he must do before petitioning for a writ of habeas corpus. 28 U.S.C. Section 2254(b). Also, although Malinovsky is entitled to relief only if he is "in custody," 28 U.S.C. Section 2254(a), this prerequisite has been met

because Malinovsky is in custody, although he has been released on a personal recognizance bond. Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984). Thus, Malinovsky's petition is properly within the jurisdiction of this Court. [sic]

At all times relevant to this case, Malinovsky was, and still is, the Chief of Police for the City of Lorain. On March 9, 1989, Malinovsky was charged in a four count indictment with: 1) extortion, in violation of Ohio Rev. Code Section 2905.11(A)(5); 2) perjury, in violation of Ohio Rev. Code Section 2921.11(A); 3) obstructing official business, in violation of Ohio Rev. Code Section 2921.31(A); and 4) interfering with civil rights, in violation of Ohio Rev. Code 2921.45(A). These four charges all relate to threats allegedly made by Malinovsky to certain Lorain

fire inspectors, in order to prevent the fire inspectors from citing a bingo parlor for violations of the fire code. The bingo parlor was operated by Malinovsky's daughter.

The State did not allege that Malinovsky threatened the fire inspectors directly. Rather, the State alleged that Lorain police detective sergeant Wayne Long communicated these threats to Lorain fire inspectors Anthony Cuevas and Roger Thomas at Malinovsky's request. Long threatened to have Cuevas and Thomas falsely charged with criminal conduct if they did not overlook the fire code violations. After Long communicated these threats to Cuevas and Thomas, the two fire inspectors informed their fire chief, who in turn brought Long's conversations to the attention of the Lorain county prosecutor. The county

prosecutor then instructed Cuevas and Thomas to tape-record their next conversation with Long. Thomas succeeded in tape-recording a subsequent telephone conversation he had with Long, during which Long implicated Malinovsky as the instigator of the threats.

With this evidence, the State brought criminal charges against Long and Malinovsky. The two defendants were tried separately, with Long's trial first. In large part due to the tape-recorded conversation, Long was found guilty of tampering with evidence. However, Long was subsequently pardoned by Governor Celeste, and continues to serve on the Lorain Police Department.

In its case against Malinovsky, the State also intended to prove Malinovsky's guilt by introducing Thomas's tape-recorded conversation with Long. Besides Thomas's testimony about

the tape recording, the State also intended to have Cuevas testify as to what Long said Malinovsky had said. Anticipating that the tape-recording and Thomas's testimony could be construed by the trial court to be inadmissible hearsay, the State made numerous attempts to raise the issue prior to trial; or, more accurately, the State tried to force Malinovsky to raise the issue prior to trial by forcing Malinovsky to file a motion to suppress. For example, the State filed a "notice of intention to use evidence," admittedly in the hope that this notice would cause Malinovsky to file a motion to suppress. Malinovsky, however, did not respond. The State then filed a motion to compel Malinovsky to file objections. That motion was overruled by the trial court.

The State freely admits that its pretrial efforts to raise the hearsay issue were made in order to allow the State to take an immediate appeal, pursuant to Ohio Crim. R. 12(J), in the event that the State received an adverse ruling on the admissibility of the evidence. Rule 12(J) provides in pertinent part:

> The state may take an appeal as of right from the granting of a motion for the return of seized property, or from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that: (1) the appeal is not taken for the purpose of delay; and (2) the granting of the motion has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

As mentioned, however, the State's efforts to obtain a pretrial ruling on the admissibility of its evidence were

unsuccessful, so it had no opportunity to take a pretrial appeal pursuant to Rule 12(J).

On June 6, 1989, the Lorain County Court of Common Pleas impaneled a jury and the case proceeded to trial. On June 8, 1989, the State questioned fire inspector Cuevas about the conversation he had had with Long, in which Long allegedly made comments relating to what Malinovsky had said. Malinovsky objected to the introduction of Cuevas's testimony as inadmissible hearsay. The State argued that the testimony fell under the co-conspirator exception to the hearsay rule, and was therefore admissible. The trial judge, finding that an insufficient foundation had been laid for admission of the evidence under the co-conspirator exception to the hearsay rule, sustained Malinovsky's objection.

A recess followed, and the State filed a notice of appeal to Ohio's Ninth District Court of Appeals, pursuant to Ohio Crim. R. 12(J). The State averred that the trial court's ruling had effectively eviscerated the State's case against Malinovsky and that the appeal was not being taken for purposes of delay. After the recess, however, the trial court insisted that the State continue with its case, despite the State having filed its appeal.

In compliance with the trial court's direction to proceed, the State called to the witness stand fire inspector Thomas, and attempted to elicit from him testimony about the tape-recorded conversation he had had with Long. Once again, Malinovsky objected to the introduction of Thomas's testimony as inadmissible hearsay, and the State argued that the testimony fell

within the co-conspirator exception to the hearsay rule. The trial court again sustained Malinovsky's objection, and refused to permit the State to play the tape-recorded conversation for the jury.

Following these rulings, the trial court took another recess in order to hold a conference with the parties in chambers. During that conference, the State took the position that the trial court's evidentiary rulings were tantamount to a suppression and that pending the resolution of the State's appeal, the trial court was deprived of further jurisdiction. The State also maintained, in response to a question from the trial court, that "[t]he State is not in a position to proceed with any degree of prosecution based upon the evidence, evidentiary rulings; and to call any other witnesses would be

absolutely futile." Trial transcript at 197-98.

After the State made clear that it would not call any further witnesses, Malinovsky moved for a judgment of acquittal under Ohio Crim. R. 29. In response to Malinovsky's motion for acquittal, the State's attorney declared: Well, I'd like it clear that I have not rested, and don't feel that anybody can do anything after I filed the notice of appeal at this level." Id at 199. However, the trial court ruled that "the appeal that has been taken is not a final order; and any attempt to perfect such an appeal is not of any legal force or effect; and, therefore, I hadn't made any order on the prosecuting attorney's office, but I had requested that you proceed with evidence in this case." Id at 199-200.

Accordingly, the trial court resumed proceedings before the jury, and directed the State to call its next witness. Consistent with the position that it had taken during the conference in chambers, the State declared that it had no further witnesses, but declined to rest. The trial court then retired the jury, and further discussion ensued between the trial court and both parties.

During the course of those discussions, the trial court reminded the State that only one of the four charges against Malinovsky was a conspiracy count (count four), and then asked the State whether it had any separate evidence concerning the other three counts. The State responded that to prove the three other charges, it intended to rely on the same evidence that the trial court had previously

ruled inadmissible, so the State could not go forward on those charges, either. Malinovsky reacted by moving for a judgment of acquittal.

The trial court reiterated that after reviewing the law and the evidence, it remained convinced that the evidence in question was inadmissable [sic] because no foundation had been laid to bring it within the co-conspirator exception to the hearsay rule. However, the trial court was reluctant to enter a judgment of acquittal, and dismissed the case for want of prosecution. The record reads:

> THE COURT: At this juncture, the court finds that there is an unwillingness on the part of the State to proceed with its case. As the court indicated yesterday, the prosecution cannot be in a position to frustrate the legitimate interests of the court in completing the lawsuit.
>
> The court will not grant any stay and continue this trial indefinitely. The court

finds further that it would be inappropriate to render a judgment of acquittal for the defendant.

Rather, the court will enter a dismissal of the charges for want of prosecution on behalf of the State. The court, in making this determination, finds that only one of the four counts charged in the indictment relates to the conspiracy.

That means that the State's burden is to prove by evidence which convinces the jury beyond a reasonable doubt all of the essential elements of the crimes of extortion, perjury and the misdemeanor offense of obstruction of the performance of the duties of a public official.

Whether or not the evidence of conspiracy relates to those matters is not at issue because there is no such evidence been [sic] admitted into this trial. And whether or not the court's decisions are in accordance with the applicable case law is not a matter for review by any party other than the appellate court.

And, therefore, this court will journalize its entry. And the only entry the court will journalize is that this case will be dismissed for want of prosecution by the State. We'll stand in recess.

THE BAILIFF: Court is recessed.

> MR. SMITH [FOR MALINOVSKY]: I would like to state for the record that we object to the judge's ruling about a dismissal. We feel it should have been a verdict of acquittal, because the State had effectively rested and a jury was impaneled; and, therefore, an acquittal should ensue, and a verdict should be granted because they failed to prove their case.

Id at 209-10.

After this colloquy, the trial court recalled the jury, advised the jurors that "for reasons that do not concern you at this time, the court has decided to dismiss for want of prosecution [the] charges against the defendant," and dismissed the jury. Id at 210-11. The trial court then journalized its entry of dismissal for want of prosecution. State v. Malinovsky, No. 89-CR-037121, slip op. (Lorain Cty. Ct. Common Pleas June 6, 1989).

The State then appealed the trial court's dismissal of the action for want of prosecution. The Ohio Court of Appeals dismissed the State's appeal, holding that a mid-trial appeal of an adverse evidentiary ruling by the State was not permitted under Ohio Crim. R. 12(J). State v. Malinovsky, No. 89-CA-004592, slip op. at 5 (Ohio Ct. App. Dec. 27, 1989). The Ohio Court of Appeals further held that the double jeopardy clause of the fifth amendment to the United States Constitution, as well as section 10, article I, of the Ohio Constitution, barred further proceedings against Malinovsky. Id at 8.

The State then pursued an appeal to the Ohio Supreme Court. The Ohio Supreme Court reversed. With respect to the mid-trial appeal issue, the Ohio Supreme Court stated:

> Under Crim. R. 12(J) the state must certify that the appeal is not taken for the purpose of delay and that the complained-of ruling destroys the state's case. Because the state certifies that the ruling destroys its case, the ruling is, in essence, a final order.

State v. Malinovsky, 573 N.E. 2d 22, 25 (Ohio 1991), cert. denied ____ U.S. ____, 112 S. Ct. 582, 116 L.Ed. 2d 607 (1991). With respect to the double jeopardy issue, the Ohio Supreme Court cited United States v. Scott, 437 U.S. 82 (1978), and State v. Calhoun, 481 N.E. 2d 624 (1985), cert. denied 474 U.S. 983 (1985), and held:

> In Scott, the United States Supreme Court held that double jeopardy protection is not absolute until there is a dismissal or acquittal based upon a factual finding of innocence. Scott ultimately held that retrial is permissible after the guarantee against double jeopardy has attached where the defendant has sought a termination of the proceedings on grounds other than the state's failure of proof.

> Similarly, in Calhoun, we held that retrial was not barred by the Double Jeopardy Clause where a trial court erroneously dismissed an indictment at trial on the grounds that the statute establishing the crime was unconstitutionally vague.
>
> Today, we are asked whether double jeopardy bars retrial where a trial court, after ruling on a defendant's objection to evidence crucial to the state's case, erroneously precluded the state from taking a Crim. R. 12(J) appeal and subsequently dismissed criminal charges for a failure to prosecute. Because the Crim. R. 12(J) appeal and subsequent dismissal for failure to prosecute were precipitated by the defendant's objection, in light of Scott and Calhoun, we hold that the Double Jeopardy Clause does not bar reprosecution where a criminal prosecution is dismissed for failure to prosecute after the trial court has erroneously required the state to proceed with trial despite the state's properly filed Crim. R. 12(J) appeal.

Id at 25-26 (citations omitted).

The Ohio Supreme Court then remanded the action to the Ohio Court of Appeals for a determination of whether

the trial court's evidentiary ruling had been erroneous. Malinovsky's petition for a writ of certiorari in the United States Supreme Court was denied. Malinovsky v. Ohio, 112 S. Ct. 582 (1991). On remand, the Ohio Court of Appeals found that the trial court had erred in excluding the State's evidence and remanded the case to the trial court for further proceedings. State v. Malinovsky, No. 89-CA-004592, slip op. at 6 (Ohio Ct. App. Oct. 16, 1991). Malinovsky's motion to the Ohio Supreme Court, for leave to appeal the order to the Court of Appeals on remand, was dismissed. State v. Malinovsky, No. 91-2482, slip op. (Ohio Feb. 19, 1992).

This petition for a writ of habeas corpus followed. Since the filing of this petition, the state court action has been assigned to a different trial judge, State v. Malinovsky, No. 91-AP-

194, slip op. (Ohio Apr. 6, 1992), and this Court has stayed the state court proceedings until it could act upon Malinovsky's petition. Order dated April 29, 1992. With that background, the Court [sic] now turns to the merits of Malinovsky's petition for writ of habeas corpus.

II

Malinovsky's petition raises two grounds for issuance of the writ: 1) that Malinovsky's pending retrial is barred by the double jeopardy clause [sic] contained in the fifth amendment [sic] to the United States Constitution; and 2) that the State's mid-trial appeal violated Malinovsky's due process rights, as protected by the fourteenth amendment [sic] to the United States Constitution.

As to the second of these contentions, Malinovsky claims that the three year delay between his original trial and his scheduled retrial have deprived him of due process of law. The magistrate judge, however, in his report and recommendation, found that the three year delay "was a result of both the State and [Malinovsky] exercising their rights with respect to the appellate process, and was not a result of governmental foot-shuffling for purposes of delay." Report and recommendation at 25-26. The magistrate judge further found that Malinovsky did not suffer any prejudice from this delay. Accordingly, the magistrate judge recommended that this Court [sic] find Malinovsky's "assertion of a due process violation by reason of the lapse of time not well-taken." Id at 26. This Court must evaluate the magistrate judge's

recommendation under a de novo [sic] standard of review. Fed. R. Civ. P. 72(b).

Neither Malinovsky nor the State has set forth any objection to this portion of the magistrate judge's report and recommendation. Moreover, this Court agrees with the magistrate judge's analysis. Therefore, the Court adopts the magistrate judge's finding that Malinovsky's due process grounds for issuance of the writ are meritless, and declines to issue the writ on those grounds. Since the Court, [sic] upon its own de novo review of the record, reaches the same conclusions as the magistrate judge, no further articulation of its reasoning regarding this issue is required. Tuggle v. Seabold, 806 F.2d 87, 92-93 (6th Cir. 1986).

As to the first of Malinovsky's contentions -- that the writ should issue because Malinovsky's double jeopardy rights have been violated -- both the State and Malinovsky have filed strongly worded memoranda, respectively urging the Court [sic] to discard and adopt the magistrate judge's recommendation. Upon consideration of these memoranda, the Court [sic] finds itself in agreement with the magistrate judge's report and recommendation concerning the double jeopardy issue. However, because the Court's analysis is slightly different from that of the magistrate judge's, the Court undertakes below a full evaluation of Malinovsky's argument that retrial would violate his double jeopardy rights.

III.

The double jeopardy clause of the fifth amendment [sic] states that "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb ...." U.S. Const. amend. V. [sic] This clause has long been construed to mean that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense...." United States v. Scott, 437 U.S. 87, 87 (1978) (quoting Green v. United States 355 U.S. 184, 187 (1957)). This prohibition bars double jeopardy by state, as well as federal, prosecutions. Benton v. Maryland, 395 U.S. 784 (1969).

However, the guarantee against double jeopardy is not absolute. As the Scott court explained:

> These, then, at least, are two venerable principles of double

> jeopardy jurisprudence[: first, t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, ... poses no bar to further prosecution on the same charge[; and second, a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.

United States v. Scott, 437 U.S. at 90-91 (emphasis added). Thus, an accused may indeed be tried more than once, depending upon exactly what judgment was entered in the first trial, and on what basis that judgment was made.

A defendant's first trial may end in many ways: an acquittal on the evidence; a finding of guilt; a ruling that the evidence is insufficient to convict; a mistrial; or a determination of the trial on some other basis not related to factual guilt or innocence.

The rules cited above in Scott explain the effect of the double jeopardy clause when a court enters a judgment of acquittal, a judgment of conviction, or a ruling that the evidence is insufficient to convict. In addition, there is settled double jeopardy jurisprudence with respect to a trial court's failure to reach a final determination of the accused's guilt or innocence. This circumstance may arise

> in two different situations: the first, in which the trial judge declares a mistrial; the second, in which the trial judge terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence.

Id at 92. As to the first situation, when a trial court declares a mistrial, the Supreme Court has drawn a distinction between, on the one hand, mistrials declared upon a request by the defendant, and on the other hand,

mistrials declared upon a request by the State, or declared sua sponte. The Supreme Court has stated that

> in passing on the propriety of a declaration of mistrial granted at the behest of the prosecution or the court's own motion, this Court has balanced "the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him," ... against the public interest in insuring that justice is meted out to offenders.

Id (citation omitted). This balancing is done by placing upon the prosecutor "the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate the 'manifest necessity' for any mistrial declared over the objection of the defendant." Arizona v. Washington, 434 U.S. 497, 505 (1978), (footnotes omitted).

However, if the defendant, rather than the State or the trial court itself, pursues a declaration of a mistrial, then retrial of the defendant is not precluded:

> Where, on the other hand, a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution. ... Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined by the first trier of fact.

United States v. Scott, 437 U.S. at 93 (emphasis in original).

Finally, the trial court may terminate the proceedings favorably to the defendant on some other basis not related to factual guilt or innocence. For example, as happened in Scott, the trial court may grant a midtrial dismissal of the indictment, based on the ground of prejudicial pretrial

delay. When such a situation occurs, the Court must examine whether the dismissal was the defendant's voluntary choice:

> the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.

Id at 98-99. The Scott court contrasted this scenario with one where the dismissal was declared even though the defendant had "insisted on having the issue of guilt submitted to the first trier of fact." Id at 96.

The magistrate judge determined that the trial court's action was the equivalent of declaring a mistrial without Malinovsky's consent and without "manifest necessity;" therefore, the

magistrate judge concluded that reprosecution of Malinovsky is barred by double jeopardy considerations. The State insists that a different double jeopardy "rule" should be applied, because the result of Malinovsky's first trial was not a mistrial sought by the State, but a mistrial or dismissal sought by Malinovsky himself.

The central question in this case, therefore, is: What was the exact disposition of Malinovsky's state criminal trial? When the trial court "dismissed" the case against Malinovsky "for want of prosecution," was this a dismissal without Malinovsky's consent? Or was it really the functional equivalent of a mistrial requested by Malinovsky? Or was it perhaps something else, such as an acquittal based on lack of sufficient evidence?

While the State has registered several objections to the form, content, and tone of the magistrate judge's recommendation, it is at bottom the magistrate judge's conclusion that Malinovsky's first trial concluded with the declaration of a mistrial, without Malinovsky's consent and without a showing of manifest necessity, to which the State so strongly objects.

IV.

After the State indicated that it would not call any further witnesses in its case against Malinovsky, the trial court entered its judgment that the case was "dismissed for want of prosecution." State v. Malinovsky, No. 89-CR-037121, slip op. (Lorain Cty. Ct. Common Pleas June 6, 1989). That the trial court identified its judgment as a dismissal, however, is not binding upon this Court:

"the trial judge's characterization of his own action cannot control the classification of the action. [sic] United States v. Sisson, 399 U.S. 267, 290 (1970).

As noted above, the Court's [sic] analysis depends at least to some extent on whether the trial court's action was truly a "dismissal," as the trial court termed it, or instead a declaration of a mistrial. One commentator has stated that "[e]ssentially, the difference between the two is that a dismissal is granted for an error or defect thought to present an absolute barrier to conviction on the offense charged, while a mistrial is declared merely because of circumstances making it impossible or impracticable to continue the particular trial to conclusion." 3 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure Section 24.2(a), at 67 (1984). Under

this guideline, the state trial court's judgment appears to be a declaration of mistrial, since it was merely an evidentiary ruling that prevented the State from pursuing its case. It was for precisely this reason that the magistrate judge treated the trial court's dismissal as a mistrial for purposes of habeas corpus review.

A more fundamental problem, however, and part of the basis for the State's objection, is that regardless of whether the trial court's action is construed as a dismissal or a mistrial, the Ohio Supreme Court has ruled that the trial court was without jurisdiction to enter a judgment of any kind.

Before the Ohio Supreme Court decided State v. Malinovsky, 573 N.E. 2d 22, 25 (Ohio 1991), cert. denied _____ U.S. ___, 112 S. Ct. 582, 116 L.Ed. 2d 607 (1991), it had never been presented

with the question of whether Ohio Crim. R. 12(J) allowed the State to appeal an adverse ruling midtrial. In fact, the Ohio Court of Appeals ruled that Rule 12(J) only allowed pretrial appeals by the State, State v. Malinovsky, No. 89-CA-004592, slip op. at 5 (Ohio Ct. App. Dec. 27, 1989), but the Supreme Court reversed.

Once the Ohio Supreme Court clarified Ohio Crim. R. 12(J) in State v. Malinovsky, and found that the State had not acted improperly when it filed its midtrial appeal, it became clear that the trial court had entered its judgment of "dismissal for want of prosecution" without jurisdiction. This is because an appeal necessarily stays trial court proceedings:

> Although the trial court retains jurisdiction over issues that are not before the Court of Appeals [sic] on an appeal, such as collateral issues of contempt of court,

> ... after an appeal is properly taken, a trial court cannot proceed in such a manner as to lead to a decision of a question which cannot properly be determined until after the determination of the appeal. The trial court may not dispose of a case so as to interfere with the jurisdiction or order of the appellate court. The proceedings of the trial court pending appeal are subject to be set aside if such proceedings are inconsistent with the order or decision of the appellate court.

State v. Watson, 355 N.E.2d 883, 885-86 (Ohio Ct. App. 1975) (emphasis added) (citations omitted). Thus, it can be argued that whether the trial court's judgment of dismissal for want of prosecution was the functional equivalent of a mistrial, an acquittal, or anything else, it was a judgment made without jurisdiction.

The State seizes upon this jurisdictional issue and argues that the magistrate judge's report and recommendation must be disregarded. The

State correctly notes that the magistrate judge's report and recommendation is based upon the conclusion that the trial court's actions were the functional equivalent of a mistrial without Malinovsky's consent. The State insists that the trial court's actions were not the functional equivalent of declaring a mistrial; rather, the trial judge's actions, regardless of how they are characterized, are simply null and void for lack of jurisdiction. Essentially, according to the State, Malinovsky's trial was simply stayed upon the State's filing of its Crim. R. 12(J) appeal and his trial should now proceed, but with a new jury. The State argues that further proceedings are not really a "retrial" but a "resumption of trial," so there can exist no double jeopardy bar in this case.

The problem with the State's argument is that it ignores the reality of what happened -- the trial court dismissed Malinovsky's first chosen trier of fact. Not only that, but the trial court did nothing to preserve Malinovsky's right to proceed with his first chosen jury: the trial court stated, "in [excusing you], the court will relieve you of the admonitions. You recall how strenuously I had urged each of you to abide by it. And, at this point, I'm going to absolve that; and you can discuss this case with anyone, if you so desire." Trial transcript at 211 (emphasis added). The trial court also stated, "The court will not grant any stay and continue this trial indefinitely." Id at 209.

Thus, whether or not the trial court had the authority to do so, it is obvious that it aborted Malinovsky's

trial. Technically, Malinovsky's trial may have been stayed when the State filed its appeal. But the trial court certainly did nothing to protect Malinovsky's "valued right ... to have his trial completed by the particular tribunal summoned to sit in judgment on him." Downum v. United States, 372 U.S. 734, 736 (1963). The trial court's actions may not conform with the typical behavior of a court declaring a mistrial, but this Court [sic] agrees with the magistrate judge that the trial court's actions were more similar to a declaration of a mistrial than to anything else.

The State further argues, however, that even if the trial court did abort the trial, this halting was brought about by Malinovsky himself, so Malinovsky cannot now be heard to complain that he is being twice put at

jeopardy. In support of this argument, the State points to the Ohio Supreme Court's conclusion that "in light of Scott ..., we hold that the Double Jeopardy Clause does not bar reprosecution where a criminal prosecution is dismissed for failure to prosecute after the trial court has erroneously required the state to proceed with trial despite the state's properly filed Crim. R. 12(J) appeal." State v. Malinovsky, 573 N.E. 2d 22, 26 (Ohio 1991), cert. denied _____ U.S. _____, 112 S. Ct. 582, 116 L.Ed 2d 607 (1991) (citation omitted).

As did the magistrate judge, however, this Court [sic] finds that the Ohio Supreme Court reads Scott too broadly.[1] The Scott court found that

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[1] Although 28 U.S.C. Section 2254 calls for this Court [sic] to "presume correct" any findings of fact made by a state court, Sumner v. Mata, 449 U.S. 539, 547 (1981), issues of law or mixed

retrial is not barred when "the Government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first empaneled to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence." Scott 437 U.S. at 97. In this case, the State was not willing to produce evidence to show that Malinovsky was guilty of the crimes with which he was charged, and Malinovsky did not seek termination of the trial. On the contrary, Malinovsky twice asked the trial court to enter a final judgment of acquittal, and no doubt would not have opposed the case being sent to the jury for deliberation and a verdict. To hold

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issues of law and fact are subject to independent determination by this Court [sic] in habeas corpus proceedings. Smith v. Sowders, 848 F.2d 135 (6th Cir. 1988); Pryor v. Rose, 724 F.2d 525, 528 (6th Cir. 1984).

that Malinovsky's objection to the introduction of evidence -- an objection that was sustained -- was an attempt to terminate the trial, is to stretch the holding of Scott beyond recognition.

The problem, then, is that in this case we have neither a defendant who "deliberately chos[e] to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence," id [sic] at 98-99, nor do we have "an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the trier of fact." Id at 96. Furthermore, while the Court [sic] agrees with the magistrate judge's analysis and conclusion that the trial court's actions were the functional equivalent of a mistrial, the analysis is

complicated by the fact that the trial court presumably was without jurisdiction to do what it did.

Given this scenario, the Court [sic] finds that the magistrate judge's reliance on United States v. Jorn, 400 U.S. 470 (1970), is appropriate, and adopts the magistrate judge's analysis and conclusion as its own. Report and recommendation at 20-25. In addition, the Court finds that the Ninth Circuit has provided helpful instruction for a situation such as this. The following lengthy quote from United States v. Dahlstrum, 655 F.2d 971 (9th Cir. 1981) is enlightening:

> The Supreme Court ... has stated that a second prosecution does not offend the double jeopardy clause if "the defendant is responsible for the second prosecution." [Scott] at 96. (emphasis added). ... This "exception" from the double jeopardy bar clearly contemplates a significant level of participation by the defendant

in bringing about a termination of his trial prior to a determination on the merits. The Supreme Court in Scott, emphasized this by its descriptions of the sort of defense participation which removes any double jeopardy problem, e.g., the defendant "elected to seek termination", made a "voluntary choice", "successfully avoided [a decision on the merits] ... by persuading the trial court to dismiss", "undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury", "obtain[ed] the termination", and [sought] to have the trial terminated." (Emphasis added). The Court stressed the importance of the defendant retaining "primary control over the course to be followed." [Scott at 94]. ...

Here, the judge was the instigator and the primary mover of the events that led to the dismissal of the indictment. The record convinces us that the judge took complete control of the proceedings and set off on a course over which appellee had practically no control. ... The transcript clearly shows that the judge did not believe the government had proved its case. In these circumstances, there is no doubt but that appellee wanted the judge to decide the case in his favor. Appellee certainly was not

> seeking to avoid a decision by the trier of fact. His relatively passive role should not be taken to reflect anything beyond a keen appreciation of the fact that the judge had taken over the proceedings.
>
> We do not believe that appellee can be considered responsible for the termination of his trial. He did not "voluntarily choose" to avoid submitting the case to the trier of facts on the merits, in the sense the Supreme Court described in Scott. We can find no persuasive justification for an expansive reading of Scott. In fact, the serious risks to double jeopardy clause values presented by multiple prosecutions caution against such a construction.

Id at 975-76 (emphasis in original).

The Dahlstrum court concluded that "even though the trial court's decision may not have been a factual determination of guilt or innocence, the government's appeal is barred by the double jeopardy clause because appellee did not 'seek' the termination of his trial." Id at 976 (footnote omitted).

Similarly, this Court [sic] concludes that the trial court aborted Malinovsky's trial without reaching a factual determination of guilt or innocence. It did so by effectively declaring a mistrial when it entered a judgment of "dismissal for want of prosecution" and by releasing the jury, despite its lack of jurisdiction to do so. Further, this Court [sic] finds that the State may not again put Malinovsky at jeopardy, because he did not seek to halt his trial. When a trial judge aborts a trial after jeopardy attaches, even though neither the State nor the defendant sought the halting of the trial, a retrial of the defendant is in violation of the double jeopardy clause contained in the fifth amendment [sic] to the United States Constitution.

This case forces the Court to choose between "the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury," Arizona v. Washington, 434 U.S. at 505, and the defendant's "valued right to have his guilt or innocence determined by the first trier of fact," United States v. Scott, 437 U.S [sic] at 93. Given the factual scenario presented in this action, the public interest must be subordinated to the defendant's constitutional rights. The State's arguments that Malinovsky may be guilty of the crimes charged does not change this result. Accordingly, Malinovsky's petition for a writ of habeas corpus is granted.

IV.

In summary, the State's objections to the magistrate judge's report and recommendation are overruled. Upon its own de novo review of the record, the Court [sic] reaches the same conclusions as did the magistrate judge, and the Court [sic] therefore adopts the magistrate judge's report and recommendation as its own. For the reasons set forth in that report and recommendation, and for the additional reasons outlined in this Memorandum and Order, Malinovsky's petition for awrit of habeas corpus is granted.

IT IS SO ORDERED.

ANN ALDRICH
UNITED STATES DISTRICT JUDGE